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JDI BUILTECH (M) SDN BHD v. DANGA JED DEVELOPMENT MALAYSIA SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
CHE MOHD RUZIMA GHAZALI JCA
B MOHAMED ZAINI MAZLAN JCA
[CIVIL APPEAL NO: J-02(C)(A)-1066-06-2022]
22 NOVEMBER 2023

C **Abstract** – *(i) The direct payment remedy under s. 30 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') would be most suited in cases where the work is on-going. Section 30(2) which prescribes that the principal shall serve a notice to its main contractor, has to be read subject to s. 30(5); (ii) While the obligation of*
D *the principal to pay a subcontractor is an independent statutory remedy specially provided for under the CIPAA, that is still subject to the over-arching provision of s. 30(5) of the CIPAA for unless the subcontractor can prove that there is money due or payable by the principal to the main contractor, the other subsections of s. 30 could not be engaged and*
E *activated; (iii) The remedy of direct payment does not dispense with the need for proof by the subcontractor of money due or payable by the principal to the main contractor.*

F ***CONSTRUCTION LAW:*** *Construction Industry Payment and Adjudication Act 2012 – Section 30 – Direct payment application – Operation of s. 30 – Works carried out by subcontractor for main contractor done for ultimate benefit of principal – Claim by subcontractor for sums owing from principal – Legal and evidential burden of proof between principal and subcontractor – Whether s. 30(5) pre-condition to be met before direct payment order could be made – Whether subcontractor with*
G *adjudication decision in its favour had discharged burden of proof to show that there was money due or payable from principal to main contractor – Whether there was evidence of money due or payable – Whether fear of double recovery should be factor to be considered for dismissing s. 30 direct payment application*

H The appellant ('subcontractor') commenced a claim in the High Court for a sum owing from the respondent ('principal'), stemming from the fact that whatever work done by the subcontractor for the main contractor was done for the ultimate benefit of the principal. Whilst the principal did not dispute the contractual relationship of principal and the subcontractor, the principal denied that there was any debt owing or payable to the main contractor as the principal had terminated its contract with the main contractor for various
I breaches of the contract. The principal contended that when the contract

between the principal and the main contractor was terminated by the principal, invariably, the contract between the subcontractor and the main contractor was also terminated. There was also a sum of about RM41.4 million due and payable from the main contractor to it. The subcontractor on the other hand argued that (i) s. 30 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') created an independent obligation on the part of the principal to pay direct to the subcontractor the adjudication sum, as stated in the adjudication decision with no liberty to apply any set off by the principal as against its main contractor; and (ii) the whole scheme of the CIPAA was to facilitate cash flow for the party that had done the work and any sum paid by the principal direct to it could always be claimed by the principal against its main contractor as a debt. The High Court (i) alluded to the fact that there was a previous original contract in 2015 between the principal and the main contractor which was terminated in 2019 and the parties were still finalising the account to determine whether there was any money due or payable to the main contractor and thus at the time of receipt of the subcontractor's demand by the principal, there was yet a sum of money due or payable from the principal to the main contractor; and (ii) was satisfied that the subcontractor had not discharged the overall burden of proving that there was money due and payable by the principal to the main contractor which sum should be the subject of a direct payment order under s. 30 of the CIPAA for the principal to pay the subcontractor. Hence, the present appeal. The issues that arose were: (i) whether s. 30(5) of the CIPAA was a pre-condition to be met before direct payment order could be made; (ii) whether the subcontractor with an adjudication decision in its favour had discharged the burden of proof to show that there was money due or payable from the principal to the main contractor; (iii) whether there was evidence of money due or payable merely based on previous direct payments; (iv) whether there was evidence of money due or payable merely because the principal had sought an indemnity from the main contractor; (v) whether there was evidence of money due and payable based on a letter of demand sent out by the project manager of the main contractor when it was in liquidation; and (vi) whether the fear of a double recovery should be a factor to be considered for dismissing a s. 30 of the CIPAA direct payment application.

Held (dismissing appeal)

Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Upon receipt of the subcontractor's written notice under s. 30(1) of the CIPAA by its letter and its solicitors' letter, demanding the principal to make direct payment to the subcontractor, the principal had responded that there was no sum due and payable by the respondent to its main contractor and thus, there was no basis for the subcontractor to invoke

s. 30. Concurrently, the principal also wrote to its main contractor to resolve its dispute with the appellant, given that there was no outstanding sum due to the main contractor. In the event there was no money due or payable as referred to in s. 30(5) of the CIPAA, then obviously it would not be necessary for the principal to give notice to its main contractor to show proof of payment having been made to its subcontractor and if no proof was forthcoming, then it would be making direct payment to the subcontractor. If nevertheless the principal had to make direct payment the moment there was no proof from its main contractor, irrespective if there was no money due or payable by the principal to its main contractor, then it would not have been necessary to have s. 30(5) of the CIPAA. Where s. 30(5) could be read harmoniously and *in tandem* with the other subsections without doing violence to the language used, then that interpretation was to be preferred compared to one where a whole subsection, as in s. 30(5) had to be disregarded altogether. (paras 48-51)

(2) It could not be conclusively said on a balance of probabilities that in the circumstances of this case, there was a sum of money due or payable by the principal to the main contractor at the material time of the subcontractor's written request on the principal that could be the subject matter of a direct payment order by the court. The principal and the main contractor did have a dispute on who owed how much to whom and that had to be resolved at a different forum between the two disputants. Meanwhile, the subcontractor had unleashed the most potent weapon of winding up the main contractor and must rely on the liquidator appointed to do his thorough task of recovering what was due to the main contractor for distribution to all creditors. (paras 70 & 71)

(3) The direct payment arrangement or facilitation as permitted under the subcontract without creating privity between the principal and the subcontractor could not be elevated or evolved into a ground to support a s. 30 of the CIPAA direct payment from the principal remedy. It still remained for the subcontractor to prove that there was money due or payable by the principal to its main contractor. As the appellant failed to discharge that burden of proof, it was not entitled to invoke the remedy of direct payment under s. 30 of the CIPAA. (paras 80 & 81)

(4) All that the principal stated in its letter to the main contractor was that it would seek an indemnity from its main contractor should the subcontractor commence an action for direct payment. The context of the letter was to cater to a situation should the principal be found liable to make the direct payment to the subcontractor in spite of its stand that there was no money due or payable to the main contractor. Whilst the principal was confident of the stand that it had taken, there was always

the element of uncertainty when a matter goes to court and so, on an abundance of caution, the principal put the main contractor on notice that it would be seeking an indemnity from its main contractor should it be required to make direct payment to the subcontractor. It was not an admission that there was money due and payable to its main contractor for otherwise, it would not be stating that '… we do not owe you any sum for the project …' in its letter to the main contractor. It was a case where in the unlikely event that it was held liable, then it would be looking to the main contractor for an indemnity. (paras 82, 83, 85 & 86)

(5) As both the principal and the main contractor could not agree on the issue of whose termination was lawful, the matter would have to be resolved at arbitration. The consequences and calculations with respect to the heads of damages would be different depending on which termination was lawful. As between the principal and the main contractor, there was no adjudication under the CIPAA between them, the issue of whether cl. 25.4(d) of the PAM Contract 2006 was a conditional payment term prohibited under s. 35 of the CIPAA did not apply. The parties may want to reserve for argument at the arbitration or litigation between them if cl. 25.4(d) applied or not in a non-adjudication proceeding under the CIPAA. Even if cl. 25.4(d) of the PAM Contract 2006 is a conditional payment term applicable in an arbitration or litigation and thus prohibited, the arbitral tribunal or the court, as the case may be, would be best positioned to decide and determine the amount payable as these issues would be the subject matter of the claim before the arbitral tribunal or the court. (paras 112, 113 & 121)

(6) The High Court appeared to have taken the factor of a fear of double recovery as a further ground for dismissing the s. 30 of the CIPAA direct payment application. That fear was unfounded. The concern of double payment was more than addressed by the principal, having required to serve a notice on the main contractor to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice in a case where there was money due otherwise payable from the principal to the main contractor. The main contractor would naturally respond with proof of payment if indeed it had made payment to the subcontractor here. It was only if there was no proof of payment or no response whatsoever that the principal was obliged to make the payment over to the subcontractor or so much of the sum owing by the principal to the main contractor not exceeding the sum claimed by the subcontractor. There was thus no valid reason for the fear of double payment or recovery and much less of the subcontractor unjustly enriching itself. (paras 122-124)

Case(s) referred to:

BM City Realty & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case [2016] CLJU 1096; [2016] 1 LNS 1096 ***(refd)***

Bond M & E (KL) Sdn Bhd v. Isyoda (M) Sdn Bhd; Brampton Holdings Sdn Bhd (Third Party) [2017] CLJU 259; [2017] 1 LNS 259 HC ***(refd)***

Bond M&E Sdn Bhd v. PALI PTP Sdn Bhd [2022] 5 CLJ 543 HC ***(refd)***

Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] CLJU 187; [2020] 1 LNS 187 HC ***(refd)***

CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd [2018] CLJU 380; [2018] 1 LNS 380 HC ***(refd)***

CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd [2020] 1 CLJ 75 CA ***(refd)***

Econpile (M) Sdn Bhd v. IRDK Ventures Sdn Bhd & Another Case [2016] 5 CLJ 882 HC ***(refd)***

Gandahan Sdn Bhd v. Gigatech Engineering Sdn Bhd [2021] CLJU 2357; [2021] 1 LNS 2357 HC ***(refd)***

HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors [2018] CLJU 1938; [2018] 1 LNS 1938 HC ***(refd)***

HSL Ground Engineering Sdn Bhd v. Civil Tech Resources Sdn Bhd & Another Case [2020] CLJU 526; [2020] 1 LNS 526 HC ***(refd)***

Ireka Engineering & Construction Sdn Bhd v. TRI Pacific Engineering Sdn Bhd [2020] CLJU 387; [2020] 1 LNS 387 HC ***(refd)***

Khairi Consult Sdn Bhd v. GJ Runding Sdn Bhd [2021] CLJU 571; [2021] 1 LNS 571 HC ***(refd)***

Lion Pacific Sdn Bhd v. Pestech Technology Sdn Bhd & Another Case [2020] CLJU 2170; [2020] 1 LNS 2170 HC ***(refd)***

LTK Façade Specialist Sdn Bhd v. Sri Mutiara Development Sdn Bhd [2021] CLJU 1030; [2021] 1 LNS 1030 HC ***(refd)***

Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC ***(refd)***

Mega Mayang M&E Sdn Bhd v. Ehsan Bina Sdn Bhd & Ors [2017] CLJU 602; [2017] 1 LNS 602 HC ***(refd)***

Multi Network Sdn Bhd & Anor v. Pembinaan Jari Jaya Sdn Bhd [2022] CLJU 3223; [2022] 1 LNS 3223 HC ***(refd)***

Murni Environmental Engineering Sdn Bhd v. Eminent Ventures Sdn Bhd & Anor And Other Cases [2016] CLJU 805; [2016] 1 LNS 805 HC ***(refd)***

PCOM Pacific Sdn Bhd v. Apex Communications Sdn Bhd & Anor [2020] CLJU 130; [2020] 1 LNS 130 HC ***(refd)***

Peck Chew Piling (M) Sdn Bhd v. Panzana Enterprise Sdn Bhd [2022] CLJU 428; [2022] 1 LNS 428 HC ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] CLJU 177; [2017] 1 LNS 177 HC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 2, 13, 28, 29, 30(1), (2), (3), (4), (5), 31(2), 32, 35(1)

Rules of Court 2012, O. 49 r. 3(1)(a), (b)

Rules of the Court of Appeal 1994, r. 7(3A)(b)

For the appellant - Kenneth Liew Vui Khen; M/s TS Liew Nurzila & Co
For the respondent - Zack Tan Zhang Wei & Esther Khor Hui Hui; M/s Raja, Darryl & Loh

[Editor's note: For the High Court judgment, please see JDI Builtech (M) Sdn Bhd v. Danga Jed Development Malaysia Sdn Bhd [2022] CLJU 1777; [2022] 1 LNS 1777 (affirmed).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] This judgment will explore once again the operation of s. 30 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") with respect to direct payment from a principal employer to a subcontractor that had obtained an adjudication decision in its favour *vis-a-vis* its main contractor against whom an adjudication decision had been made. In particular, we shall explore the relationship between s. 30(5) and s. 30(2) and (3) of the CIPAA and the overall legal and evidential burden of proof on the part of the principal employer and the subcontractor.

[2] Essentially, s. 30 may be activated by a successful party in an adjudication decision to call upon the principal of the losing party in the adjudication decision to make direct payment from the principal to the successful party in the adjudication decision. For ease of reference, we shall refer to the plaintiff as the subcontractor and the defendant here in the s. 30 of the CIPAA application as the principal and the losing party in the adjudication decision as the main contractor.

Before The High Court

[3] In brief, the subcontractor in its originating summons for direct payment under s. 30 of the CIPAA, had deposed in its affidavit its belief that there is a sum owing from the principal to the main contractor which it now wants the principal to pay direct to it. The basis for that belief stems from the fact that whatever work is done by the subcontractor for the main contractor is done for the ultimate benefit of the principal and as such there would be expected a sum owing from the principal to the main contractor for the same work done.

[4] Whilst the principal does not dispute the contractual relationship of principal and main contractor and correspondingly the main contractor and the subcontractor, the principal denied that there is any debt owing or payable to the main contractor as the principal had terminated its contract with the main contractor for various breaches of the contract including wrongful suspension of works, failure to proceed with the works regularly and diligently and failure to complete the works within time.

[5] When the contract between the principal and the main contractor was terminated by the principal on 20 October 2020, invariably the contract between the subcontractor and the main contractor was terminated also. The principal said that there is a sum to the tune of about RM41.4 million due and payable from the main contractor to it under the heads of an LAD claim until termination, further additional costs of employing a new main contractor to complete the works, late delivery claims from purchasers of the various units in the project, additional overhead expenses and costs up to the actual completion of the project. It had a contemporaneous quantity surveyor report of 12 January 2021 to justify the amount.

[6] The subcontractor on the other hand stated that s. 30 of the CIPAA created an independent obligation on the part of the principal to pay direct to the subcontractor the adjudication sum as stated in the adjudication decision with no liberty to apply any set-off by the principal as against its main contractor. It further argued that the whole scheme of the CIPAA is to facilitate cash flow for the party that has done the work and that any sum paid by the principal direct to it can always be claimed by the principal against its main contractor as a debt.

[7] The principal also argued that the subcontractor cannot stand in a better position than the main contractor where payment from the principal to the main contractor is concerned. The fundamental precondition that must first be met is the requirement of s. 30(5) in that there must be money due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request for payment, in this case a request by the subcontractor calling on the principal to make to it a direct payment under s. 30(1).

[8] The High Court alluded to the fact that there was a previous original contract in 2015 between the principal and the main contractor which was terminated on 22 November 2019 and the parties were still finalising the account to determine whether there is any money due or payable to main contractor and thus at the time of receipt of the subcontractor's demand by the principal, there was yet a sum of money "due or payable" from the principal to the main contractor CTMCC. See para. [12] of the High Court's GOJ.

[9] The High Court was satisfied on the balance of probabilities, that the subcontractor as the plaintiff had not discharged the overall burden of proving that there is money due and payable by the principal to the main contractor which sum should be the subject of a direct payment order under s. 30 of the CIPAA for the principal to pay the subcontractor.

[10] Dissatisfied with the High Court's decision in dismissing its claim, the subcontractor as appellant had appeal to the Court of Appeal. The plaintiff/appellant shall be referred to as the subcontractor and the defendant/respondent shall be referred to as the principal or employer. The main contractor shall be referred to sometime as CTMCC.

Whether s. 30(5) Of The CIPAA Is A Pre-condition To Be Met Before A Direct Payment Order Can Be Made

[11] Whilst it is not denied that the whole purpose of the CIPAA is to facilitate cash flow for a contractor who had done the work, where enforcement of an adjudication decision is concerned, the requirements to be met for the various remedies available must be complied with.

[12] Thus, armed with an adjudication decision the subcontractor here may proceed under s. 28 of the CIPAA to enforce the adjudication decision as if it is a judgment of the court. The subcontractor had done so.

[13] The subcontractor may activate s. 29 of the CIPAA to suspend or reduce the rate of progress of performance of the works by serving the relevant notice on the main contractor. That may have the unintended consequence of the principal terminating the main contractor on ground that the main contractor had failed to proceed with the works regularly and diligently.

[14] The other option is to proceed under s. 30 of the CIPAA with respect to a direct payment application provided the requirement of s. 30(5) could be met. It is for the subcontractor to decide which would be the most effective for so long as there is no double recovery for s. 32 of the CIPAA allows for the concurrent exercise of remedies.

[15] In fact, there is nothing preventing the subcontractor from proceeding with a winding up petition on ground of the main contractor's inability to pay what is for the moment an undisputed debt until the adjudication decision is set aside, stayed or settled or overtaken by a court's judgment or an arbitrator's award. See s. 13 of the CIPAA.

[16] Indeed, in this case a creditor Perfect Mix Portfolio Sdn Bhd had successfully wound up the main contractor on 3 January 2022 which was later terminated by the consent of the parties. The High Court had dismissed the appellant's application for direct payment under s. 30 of the CIPAA on 7 June 2022. The subcontractor here had later wound up the main contractor on 20 July 2022.

[17] The whole s. 30 of the CIPAA is set out below for its full terms and effects:

30. Direct Payment from principal

(1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

(2) Upon receipt of the written request under subsection (1), *the principal shall serve a notice in writing* on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

(3) In the absence of proof of payment requested under subsection (2), *the principal shall pay the adjudicated amount* to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) *This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).* (emphasis added)

[18] The immediate question to ask is when s. 30 of the CIPAA would be applicable and the answer stares at us in the face in that s. 30(5) provides that "This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under sub-s. (1)." (emphasis added) It is thus the over-arching pre-condition before any of the subsections of s. 30 may be utilised. By "This section" in the opening words of s. 30(5) is meant the whole of s. 30. Thus, s. 30(5) is the foundation and base for the deployment of the other subsections in s. 30.

[19] The meaning of "This section shall only be invoked …" can be better understood by stating the opposite, which is that "This section shall not be invoked unless there is money due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under sub-s. (1)." In other words, the section shall not be invoked if there is no such money due or payable.

[20] Had there been no s. 30(5), then the appellant's learned counsel would be right in stating that for so long as the condition in s. 30(1) has not been fulfilled in that the main contractor here (the party against whom an adjudication decision was made) fails to make payment to the subcontractor (the party who obtained the adjudication decision in its favour), then the subcontractor may make a request in writing for the payment of the adjudication amount direct from the principal.

[21] It would then also follow that upon receipt of the written request under s. 30(1), the principal shall serve a notice in writing on its main contractor to show proof of payment and to state that direct payment would be made after the expiry of ten days of the service of the notice.

[22] Then, as day would follow night, in the absence of any proof of payment which would commonly be in the absence of a reply from the main contractor, the principal is legally bound to pay the adjudicated amount to the subcontractor in this case.

[23] However, that is not what Parliament had legislated and indeed Parliament had included s. 30(5) to prequalify all the above requirements. What s. 30(5) means is that, there must first be established that there is a certain sum of money due or payable by the principal to its main contractor.

[24] One cannot gloss over s. 30(5) but must give it its ordinary and natural meaning. It is certainly not there for a decorative purpose but drafted for the designed purpose of stating the condition or requirement under which the whole of s. 30 may be activated.

[25] Learned counsel for the appellant had alluded to the High Court case of *Murni Environmental Engineering Sdn Bhd v. Eminent Ventures Sdn Bhd & Anor And Other Case* [2016] CLJU 805; [2016] 1 LNS 805 where it had stated that all that was required was the fulfilment of the conditions in s. 30(1) and (2) of the CIPAA for a direct payment order to as follows:

> [13] All that is required under section 30 CIPAA is for there to be a request by Plaintiff to D2 as the principal for payment of adjudicated sum; D2 to serve a notice to D1 on proof of payment and *to state direct payment would be made after the expiry of 10 working days of service of notice and in the absence of proof of payment, D2 shall pay the adjudicated sum to Plaintiff.* (emphasis added)

[26] Like all cases cited the context must not be ignored and here the above proposition was made in the context where the issue was whether there has to be in existence a contractual relationship between the plaintiff and D2 the principal and there was no issue of whether there was a sum of money due and payable from the principal to the plaintiff subcontractor as may be seen below:

> [12] Section 30 [CIPAA] does not require there to be a contractual relationship but only that D2 is a principal ...
>
> …
>
> [16] Further section 30(5) [CIPAA] does not require that the money due and payable by D2 as the principal to D1 being the party against whom the adjudication decision was made should be in reference to the claim made by Plaintiff to the progress claim in question. So long *there is money due and owing by D2 to D1, that money shall be paid to Plaintiff and D2 may recover the said paid amount as a debt or set off from any money due or payable to D1 pursuant to section 30(4) CIPAA.* (emphasis added)

[27] We are in agreement with the characteristic clarity in the conditions couched by Wong Kian Kheong J (now JCA) in *Cabnet Systems (M) Sdn Bhd v. Dekad Kaliber Sdn Bhd & Anor* [2020] CLJU 187; [2020] 1 LNS 187 as culled from the whole of s. 30 of the CIPAA as follows:

> [29] I am of the following view regarding the application of s. 30 CIPAA:
>
> (1) a party (X) who has obtained an adjudication decision against another party (Y), may claim for the adjudicated amount from Y's principal (Z) if the following four conditions are satisfied (4 Conditions):
>
> (a) Y has failed to pay the adjudicated amount to X [please see s. 30(1) and (3) CIPAA] **(1st Condition)**;
>
> (b) X has made a written request for Z to pay the adjudicated amount directly to X (X's Written Request) [please refer to s. 30(1) CIPAA] **(2nd Condition)**;
>
> (c) **there is a sum of money due from Z to Y at the time of Z's receipt of X's Written Request [please see s. 30(5) CIPAA] (3rd Condition)**; and
>
> (d) Z did not comply with X's Written Request and did not pay the adjudicated amount directly to X **(4th Condition)**; and
>
> (2) if Z pays the adjudicated amount directly to X, by reason of s. 30(4) CIPAA, Z may recover the adjudicated amount from Y as a debt or set-off. (emphasis added)

[28] It is pertinent to note that even though the fourth condition is housed in s. 30(3) yet the learned judge had perceptively put it after the third condition which is the helming provision in s. 30(5) of the CIPAA placed after the fourth condition. That we confirm is consistent with the flow and focus of the fulfilment of the conditions consistent with its foundational principle that there must be money due and owing from the principal to its main contractor before any direct payment may be made under s. 30 of the CIPAA.

[29] The appellant had referred to the High Court case of *HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors* [2018] CLJU 1938; [2018] 1 LNS 1938 where the mandatory requirements imposed on a defendant to follow up with the prescribed acts in s. 30(2) and s. 30(3) of the CIPAA are as follows:

> [21] It is abundantly clear that "may" when used in section 30(1) denotes a discretion conferred on the successful Claimant with respect to making a request for payment from the Principal. The successful Claimant is not legally obliged to take this route for the Respondent might pay on their own accord or that there are other modes of execution which are quite effective against the Respondent.

[22] Contrast that with the use of the word "shall" in both sections 30(2) and (3). A

[23] It can only denote a mandatory meaning in that the Principal is legally required to follow up with the action prescribed. There are no two ways about it.

[24] In *Construction Adjudication in Malaysia*, 2nd edition 2018 Sweet & Maxwell by Lam Wai Loon and Ivan Y.F. Loo, the learned authors in further explaining the application of section 30 of the CIPAA commented as follows at page 479: B

> … The word 'shall' imposes upon the principal a statutory obligation to make payment of the adjudicated amount. It is considered that the result of this obligation to pay creates a cause of action whereupon **the winning party may sue the principal** for the payment should the principal fail to comply with the obligation to pay. C

[25] In the present case, the Defendant did not issue to the Respondent any notice pursuant to Section 30(2) of the CIPAA. As the mandatory 'shall' is used in section 30(2), the Defendant's failure or refusal to issue the written notice is a breach of section 30(2) of the CIPAA. The Defendant's deliberate breach of section 30(2) shall not obstruct the continuation of the direct payment mechanism under section 30(3) of the CIPAA where it provides that in the absence of proof of payment requested under subsection (2), the Principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour. I agree that the Plaintiff's contention is supported by the legal maxim Commodum Ex injuria Sua Nemo Habere Debet, in which a wrongdoer should not be enabled by law to take any advantage from his actions. D E

[26] **There can be no proof of payment as the Defendant had failed or refused to issue the notice pursuant to section 30(2) of the CIPAA.** I agree with the Plaintiff that the Defendant cannot rely on its breach of section 30(2) to avoid its mandatory obligation to make direct payment under section 30(3) of the CIPAA. (emphasis added) F

[30] Again, the context was different as there the principal did not issue any notice or letter to its main contractor to dispute that there was no money due and payable to its main contractor and the court there had quoted with approval the following: G

110. In *Construction Adjudication in Malaysia*, 2nd edition 2018, Sweet & Maxwell, by Lam Wai Loon and Ivan Y.F. Loo, the learned authors explained as follows at page 480: H

> Fifthly, and most importantly, there is money due or payable by the principal to the losing party at the time of its receipt of the written request for payment from the winning party. In this regard, *the principal is only obligated to make payment to the extent of the sum due or payable by the principal to the losing party, or the adjudicated amount, whichever is lower.* (emphasis added) I

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> 111. As stated the Plaintiff was prepared to accept a direct payment of a total of RM903,990.50 from the Defendant.

[31] Any lingering doubt perhaps had been cleared in *CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2018] CLJU 380; [2018] 1 LNS 380 where the High Court explained that:

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> [26] However **I must add a qualification to the mandatory use of the word "shall" in subsections (2) and (3) and it is that they are still subject to subsection (5) in that Section 30 may only be invoked** if money is due or payable by the principal to the Respondent in the Adjudication, BHL Builders at the time of the receipt of the request under subsection (1). (emphasis added)

C

[32] Learned counsel for the appellant had also referred to a slew of cases in support of the proposition that the condition in s. 30(2) of the CIPAA is mandatory as follows: *PCOM Pacific Sdn Bhd v. Apex Communications Sdn Bhd & Anor* [2020] CLJU 130; [2020] 1 LNS 130, *Bond M&E Sdn Bhd v. PALI* D *PTP Sdn Bhd* [2022] 5 CLJ 543 (per Aliza Sulaiman J at paras. [19] and [20]); *Peck Chew Piling (M) Sdn Bhd v. Panzana Enterprise Sdn Bhd* [2022] CLJU 428; [2022] 1 LNS 428 (per Aliza Sulaiman J at paras. [44] to [47]); *HSL Ground Engineering Sdn Bhd v. Civil Tech Resources Sdn Bhd & Another Case* [2020] CLJU 526; [2020] 1 LNS 526; [2021] 8 MLJ 347 (per Lim Chong Fong J E (now JCA) at para. [25]). Like all propositions of law derived from the particular and peculiar facts of a case, it is only relevant and applicable if the facts are similar or that the distinctions made no difference.

[33] The rationale for making the condition in s. 30(5) an essential precondition is not difficult to find. It is that if the subcontractor had done F the work and an adjudicated amount is due under an adjudication decision, the main contractor ought to be making payment to the subcontractor armed with an adjudication decision in its favour against the main contractor. It stands to reason that if in such a situation, the principal to the main contractor has a sum of money owing to the main contractor, then that sum G of money or so much of it not exceeding the adjudicated sum should be ordered to be paid by the principal direct to the subcontractor.

[34] It is a case where the subcontractor is allowed to step into the shoes of the main contractor and compel the principal to pay the subcontractor what is due from the principal to the main contractor for the amount of not H exceeding the adjudicated amount. The principal in doing so need not fear to be out of pocket for the amount paid would be recoverable as a set-off from the principal to the main contractor as the payment made is in reality payment made on behalf of the principal.

[35] In the case of the principal making an overpayment which sometimes I may only be discovered after the final account is settled between the principal and the main contractor, the principal may then recover the overpayment as a debt.

[36] Under such a scheme to facilitate payment for work already done by the subcontractor, the underlying rationale is that no one should be unduly prejudiced or taken advantage of. It is not to place anyone in a better position than he ought to be in the first place.

[37] In a case where the main contractor had already delayed in completion of the works and had not proceeded with the works regularly and diligently and the principal had already put the main contractor on notice and even issued a notice to rectify breach followed by a notice to terminate the main contract, there would be a dispute between the main contractor and the principal with respect to whether one owes the other any sums of money. The reason is not difficult to find. The principal terminating the main contract would assert that there is the agreed LAD claim for delay caused by the main contractor in not completing the work within the completion date. There would also be a claim for additional costs incurred in getting a rescue main contractor to complete the uncompleted works besides a general damages claim for additional late delivery claims from purchasers of the various units in the project and additional overhead expenses and costs up to the actual completion of the project.

[38] It is also not uncommon for the main contractor to argue that the termination had been unlawful and even to argue that it had already terminated the main contract lawfully before a belated attempt to terminate the same main contract by the principal which termination had become academic.

[39] The principal may of course argue that the main contractor's notice had been issued unreasonably or vexatiously. See cl. 26.2 of the PAM main contract.

[40] An application under s. 30 of the CIPAA in this case *via* an originating summons process is ill-suited to try issues of such a nature where everything would hinge on whether the termination of the main contract by the main contractor on the one hand and the termination by the principal on the other hand is lawful or unlawful. The main contractor is after all not a party to this s. 30 proceedings.

[41] With respect to learned counsel for the appellant/subcontractor, we find it difficult to accept that in any and every situation, whenever a notice is given by the subcontractor to the principal for direct payment under s. 30(1) and the principal is then required to give a notice to its main contractor under s. 30(2) and if there is no proof of payment by the main contractor to the subcontractor, then invariably and immediately the principal must make payment to the subcontractor. Such an argument bypasses s. 30(5) which has first to be satisfied before a direct payment may be ordered.

[42] It would allow abuse by a main contractor who is already owing its principal and has no means to pay the subcontractor to tell the subcontractor to go for a direct payment from the principal and that the principal would have no choice but be compelled by the law under the CIPAA to pay.

[43] It is no comfort to say to the principal that it can always deduct the amount paid to the subcontractor under the direct payment order that the principal can always set off the amount from current or future certificate of payment or that if the main contract had been terminated, to then recover the sum paid as a debt from its main contractor. It is even more discomforting to the principal when the main contractor is in liquidation and realising that even that is not effective to make the main contractor pay, to now say that the principal must pay first.

[44] A creditor of the main contractor would be in a position to get the liquidator appointed to pursue payment due to it, as the main contractor has essentially been paralysed by its liquidation and the key responsibilities of collecting all debts due to the main contractor is now vested in the hands of the liquidator.

[45] The s. 30 direct payment remedy would be most suited in cases where the work is ongoing and indeed even here, there had been instances in the past where the principal acceded to direct payments and made direct payments to the subcontractor until they realised that there would be irrecoverable over payment if they were to continue to do so.

[46] Section 30(2) where the principal shall serve a notice on its main contractor has to be read subject to s. 30(5) and here the principal did write to its main contractor on 8 October 2021 to say that there was no money owing to the main contractor and to request the main contractor to resolve its dispute with the subcontractor.

[47] To the principal, there may be two situations where there is no amount due or payable from it to its main contractor at the time when the written notice under s. 30(1) was given by the subcontractor to the principal. One could be where it had already paid its main contractor and the other could be where there is a *bona fide* dispute between the principal and its main contractor such that at the date of service of the written notice under s. 30(1) it cannot be said that there is already money due or payable by the principal to the main contractor.

[48] In this case, upon receipt of the appellant subcontractor's written notice under s. 30(1) by its letter dated 8 September 2021 and its solicitors' letter dated 28 September 2021 demanding the respondent principal to make direct payment to the appellant subcontractor, the respondent had through its letter dated 15 September 2021 and its solicitors' letter dated 5 October 2021

responded that there is no sum due and payable by the respondent to its main contractor CTMCC and thus, there is no basis for the appellant to invoke s. 30.

[49] The appellant's said letters and that of its solicitors are at pdf pp. 103 to 135 encl. 20 and pp. 149 to 179 encl. 20 respectively. That of the respondent and its solicitors are pages pdf 137 and 181 to 182 encl. 20 respectively. Concurrently, the respondent principal also wrote to its main contractor CTMCC on 15 September 2021 and 8 October 2021 to resolve its dispute with the appellant given that there is no outstanding sum due to CTMCC. See the said letters at pages pdf 259 to 262 encl. 20.

[50] In the event that there is no money due or payable as referred to in s. 30(5), then obviously it would not be necessary for the principal to give notice to its main contractor to show proof of payment having being made to its subcontractor and if no proof is forthcoming then, it would be making direct payment to the subcontractor.

[51] If nevertheless the principal has to make direct payment the moment there is no proof received from its main contractor, irrespective if there is no money due or payable by the principal to its main contractor, then it would not have been necessary to have s. 30(5). Where s. 30(5) can be read harmoniously and *in tandem* with the other subsections without doing violence to the language used, then that interpretation is to be preferred compared to one where a whole subsection as in s. 30(5) has to be disregarded altogether.

Whether The Subcontractor With An Adjudication Decision In Its Favour Has Discharged The Burden Of Proof To Show That There Is Money Due Or Payable From The Principal To The Main Contractor

[52] There was no evidence of any contemporaneous reply from the main contractor after the principal had written to it upon receipt of the subcontractor's written request for direct payment under s. 30(1) to state that the principal did not have money due or payable to the main contractor. The legal and initial evidential burden to prove that there is a sum of money due and payable from the principal to the main contractor lies with the subcontractor. We can accept that the subcontractor is entitled to assert that it verily believed that there is such a sum of money owing by virtue of the fact that there would ordinarily be a certificate of progress claim issued by the main contractor to the principal for work done by the subcontractor for the main contractor. As the subcontractor had not been paid, it is entitled to assume that the principal may be owing money to the main contract.

[53] That is what is generally the case which is why s. 30(2) proceeds with that assumption and it mandates the principal to give a notice to the main contractor to show proof that the main contractor had paid the subcontractor.

Such an assumption may be rebutted by the principal itself adducing evidence that it had either paid the main contractor or that there is otherwise no money outstanding at the moment of the receipt of the written request from the subcontractor for the principal to make a direct payment to the subcontractor under s. 30(1).

[54] The respective legal and evidential burden with respect to the fulfilment of the four conditions referred to by Wong Kian Kheong J (now JCA) in *Cabnet Systems (M) Sdn Bhd v. Dekad Kaliber Sdn Bhd & Anor* [2020] CLJU 187; [2020] 1 LNS 187 was further expounded by His Lordship in *LTK Façade Specialist Sdn Bhd v. Sri Mutiara Development Sdn Bhd* [2021] CLJU 1030; [2021] 1 LNS 1030 as follows:

> [26] With regard to the 4 Conditions, I have decided as follows in *Chong Lek Engineering Works Sdn Bhd v. PFCE Integrated Plant and Project Sdn Bhd and another appeal* [2021] 2 AMR 601, at [17], [18] and [20]:
>
> [17] …
>
> [18] …
>
> …
>
> [20] Regarding the application of the 4 Conditions, I am of the following view:
>
> (1) *X (who has obtained an adjudication decision against Y) has the following burdens of proof in a suit against Z under s. 30 CIPAA:*
>
> *(a) X has the legal burden to prove against Z (Y's principal) on a balance of probabilities the 4 Conditions under s. 101(1) and (2) of the Evidence Act 1950 (EA) – please refer to Lilies Suraya bt Abdul Latib & Ors v. Khairul bin Sabri & Others* [2019] 1 LNS 2099; [2020] 4 AMR 365, at [17]; and
>
> *(b) X also has the initial evidential burden pursuant to s. 102 EA to prove the 4 Conditions against Z - Lilies Suraya;*
>
> (2) regarding the 3rd Condition:
>
> (a) *if X proves the first, second and fourth Conditions ("1st Condition", "2nd Condition" and "4th Condition") as explained in Cabnet Systems, the evidential burden (not the legal burden) concerning the 3rd Condition shifts from X to Z.* This is due to the application of s. 106 EA which provides as follows:
>
> > When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. (emphasis added).
>
> Section 106 EA applies in respect of the 3rd Condition because firstly, X does not have any access to the contract between Y and Z. Nor does X have any access to the documentary evidence regarding the dealings between Y and Z. *Whether any*

sum of money is "due" or "payable" from Z to Y at the time of Z's receipt of X's Request, is "especially within the knowledge" of Z. Accordingly, if Z denies that no amount of money is "due" or "payable" from Z to Y at the time of Z's receipt of X' Request, by virtue of s. 106 EA, Z has the evidential burden to "prove" such a denial …
(emphasis added)

[55] As the assumption and initial evidential burden is discharged by the subcontractor as above stated, the evidential burden then shifts to the principal to show proof that there is no amount owing by it to the main contractor. That it may show by adducing credible evidence of a *bona fide* dispute with its main contractor and documents to substantiate that there is no money owing at that moment.

[56] Such an exercise need not be final and determinative in a case where the main contractor is not before the court and in a case like this where both the principal and main contractor are disputing each other's termination such that the matter can only be resolved in a suit or arbitration between them. Overall, the important thing is whether the appellant here as the subcontractor has proved on a balance of probabilities at the point of giving the s. 30(1) notice by the subcontractor the amount due or payable from the principal to the main contractor such that this amount should now be paid under a direct payment order.

[57] On the part of the principal, it had after the termination of the main contract with the main contractor on 20 October 2020, conducted a joint inspection with the main contractor and its quantity surveyor ("QS"), total QS services, had prepared a report dated 12 January 2021 marked as "ZL7" in encl. 10. It stated in the introduction to the report at para. 1.0 as follows:

Before completion of the Works, the Contractor committed the following defaults under the Contract:

(a) Failed to commence the Works in accordance with the Contract without reasonable cause

(b) Wholly or substantially suspended the carrying out of the Works before completion without reasonable cause

(c) Failed to proceed regularly and diligently with the Works

(d) Abandoned the Works

(e) Unreasonably and vexatiously issued a notice of default to the Employer.

On 20 October 2020, the employment of the Contractor was determined by the Employer *via* the Notice of Determination ref GLMY/S/2020/093.

Upon the said determination, a joint inspection was carried out between 21 December 2020 and 30 December 2020, attended by representatives of the Employer, the Contractor and the Consultants of the Works to

A determine the works under the Contract which had been completed by the Contractor and to identify the remaining works under the Contract (hereinafter referred to as "the Remaining Works") to be executed for the completion of the Works."

[58] Whilst what the principal had adduced is not conclusive, it does show B some contemporaneous evidence of a *bona fide* dispute that the principal had with its main contractor. The purpose of the report was to establish the additional costs for completing the remaining works resulting from the default of the contractor. It gave a detailed calculation on how the estimated additional costs for completing the remaining works is about RM26,433,000.

C **[59]** The QS report had excluded the following:

(i) land cost;

(ii) legal fees and costs;

(iii) additional local authorities charges;

D

(iv) financial costs; and

(v) other additional costs and expenses incurred or to be incurred by the employer, such as compensation payable to the purchasers of the works, management and operation expenses of the employer due to delay in E completion of the works.

[60] The principal had worked out some of the costs of the excluded items with supporting documents and information as follows:

(i) liquidated damages due to CTMCC's failure to complete the works F amounting to RM5,824,000;

(ii) liquidated damages payable by the respondent to the purchasers for the period between 21 October 2020 until 31 March 2022 amounting to RM2,948,313; and

(iii) overhead expenses incurred or to be incurred by the respondent for the G period between 21 October 2020 until 31 March 2022 amounting RM6,283,205.

[61] Together with the additional costs to complete works the addition of all these heads of damages would be RM41,488,518 without taking into H consideration the land cost, legal fees and cost and financing cost.

[62] In the case of *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717; [2016] 2 MLJ 457 the Federal Court was asked to determine, *inter alia*, the following questions:

I (ii) (a) where a garnishee has a prospective right of set off over the judgment debtor's funds which has yet to crystallise, whether such funds can be garnished by the judgment creditor;

(b) if so, whether the garnishee is entitled to exercise its right of set off and utilise the funds for its own benefit once it is served with a garnishment order *nisi*",

the Federal Court answered question (ii)(a) in the negative and question (ii)(b) in the positive.

[63] There is no good reason why the principal should not be allowed to set-off what is contractually agreed with its main contractor in the main contract when the contract is terminated and an account has to be finalised irrespective of whose termination is valid and lawful.

[64] Further, it is also provided under cl. 25.4(d) main contract following the PAM Contract 2006 (with quantities) that upon the determination of CTMCC's employment, the respondent is entitled to withhold all payments (if any) to CTMCC, pending the finalisation of the final account and the completion of all the outstanding works. See pdf pp. 199 to 253 of encl. 20.

[65] In the absence of any evidence from the appellant to rebut the principal/respondent's evidence, the evidential burden discharged by the respondent had not been rebutted by the appellant. What can be said at this juncture with reference to whether there was money due or payable at that material time of service of a written notice by the appellant subcontractor on the respondent principal is that the plaintiff had not established on a balance of probabilities its legal burden of proving the same.

[66] It may well be that in an arbitration or legal suit between the principal and the main contractor, it would be determined conclusiveness the money owing by one to the other for by then the arbitral tribunal or court as the case may be would be able to determine the legality of each other's notices of termination and the evidence on the various heads of claims of the parties. That bridge has not been crossed yet.

[67] The appellant submitted that the principal as the respondent has not taken any action against its main contractor CTMCC but then again CTMCC had also not taken any action against its principal. It could be that both have counted the costs and risks involved and would prefer its perceived losses to lie where it falls. The principal has to consider if it is worth the while to obtain a judgment against the main contractor seeing that the main contractor is already in liquidation and any judgment obtained would still be unsecured. The liquidator of the main contractor would have to consider whether its contributories or creditors would be prepared to fork out the legal costs to pursue its claim against the principal.

[68] The appellant, on the other hand and having pursued a winding up of the main contractor, would have to pursue recovery through the liquidator appointed for we cannot think of any enforcement of its adjudication decision that could be more effective than the lethal process of a winding up which

is to put an end to the main contractor in its ultimate resolution and perhaps thereafter to explore if its directors may have been liable for fraudulent trading or the carrying on of business to defraud its creditors.

[69] It is true that the Court of Appeal in *CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2020] 1 CLJ 75 held that the obligation of the principal to pay the subcontractor is an independent statutory remedy specially provided for under CIPAA but that is still subject to the over-arching provision of s. 30(5) of the CIPAA for unless the subcontractor can prove that there is money due or payable by the principal to the main contractor, the other subsections of s. 30 could not be engaged and activated. See para. [16] of the Court of Appeal's judgment.

[70] Having evaluated and assessed the evidence adduced by both the appellant subcontractor and the respondent principal, we are not able to say conclusively on a balance of probabilities that in the circumstances of this case there was a sum of money due or payable by the principal to the main contract at the material time of service of the appellant's written request on the principal that could be the subject matter of a direct payment order by the court.

[71] The principal and the main contractor do have a dispute on who owes how much to whom and that has to be resolved at a different forum between the two disputants. Meanwhile, the appellant had unleashed the most potent weapon of winding up the main contractor and must rely on the liquidator appointed to do his thorough task of recovering what is due to the main contractor for distribution to all creditors.

Whether There Is Evidence Of Money Due Or Payable Merely Based On Previous Direct Payments

[72] It is not denied that there had been previous direct payments from the principal to the subcontractor with the consent of the main contractor to help ease the cash flow of the subcontractor. Clause 26.5 of the PAM Sub-Contract 2006 expressly addressed this issue by providing that "the employer may (but not obliged to) pay such amounts directly to the sub-contractor and deduct the same from any sums due or to become due to the contractor. Any direct payment made under cl. 27.6 of the main contract conditions shall not create a privity of contract between the employer and sub-contractor."

[73] We agree with learned counsel for the principal that the past direct payments were made with the consent of the parties involved notwithstanding that the principal does not have an obligation to do so. The option available to the principal as the employer here to make direct payment to the subcontractor cannot be converted into a contractual obligation to pay directly the subcontractor.

[74] In fact, anticipating that there may be such an argument raised by the subcontractor, the main contractor and the subcontractor had both agreed in cl. 26.5 that "Any direct payment made under cl. 27.6 of the main contract conditions shall not create a privity of contract between the employer and sub-contractor." Thus, nothing could be clearer and it dispels all doubts as to the true nature of this payment arrangement which does not offend the privity of contract rule.

[75] The High Court in *Mega Mayang M&E Sdn Bhd v. Ehsan Bina Sdn Bhd & Ors* [2017] CLJU 602; [2017] 1 LNS 602 had the opportunity to comment on this direct payment arrangement as follows:

> [39] A payment arrangement term in the contract between the Plaintiff and D1 where D2 makes direct payment to the Plaintiff, does not convert the contract between the Plaintiff and D1 into one where the Plaintiff can enforce the direct payment arrangement against D2 direct.
>
> [40] *That would be to change the law on privity of contract and to change the complexion and character of contract law altogether. The legal obligation to pay remains that of D1, as main contractor, to the Plaintiff, its subcontractor and D2 as the Employer/Developer to D1 as its main contractor.* (emphasis added)

[76] Enforcement of an adjudication decision or even a judgment may well affect a third party who owes a judgment debtor or a person against whom an adjudication decision has been made. That is quite different from trying to elevate a direct payment arrangement to the status of a contract between the third party and the judgment creditor or the person in whose favour an adjudication decision has been made.

[77] The original parties to the subcontract remain the parties where suing and being sued is concerned and this becomes even clearer when for matters of late completion, defective works and termination would have to involve the contracting parties and not the principal who is not privy to the subcontract.

[78] In any event, there was no agreement or any commitment by the respondent that it would pay on behalf of CTMCC all the sums due or payable by CTMCC to the appellant even in a situation where there is no money due or payable by respondent to CTMCC where the respondent can exercise its right to set-off and/or deduct such direct payments from, which is the present case here.

[79] Learned counsel for the respondent submitted that most of the direct payments were made to the appellant prior to the issuance of the QS report dated 12 January 2021 and that upon realising that there was no longer any money due and owing by the respondent to its main contractor CTMCC, it had stopped the direct payment facilitation as there was a risk that it would not be able to recover the monies paid from CTMCC.

[80] We are satisfied that the direct payment arrangement or facilitation as permitted under the subcontract without creating privity between the principal and the subcontractor cannot be elevated or evolved into a ground to support a s. 30 of the CIPAA direct payment from the principal remedy.

[81] It still remains for the appellant subcontractor to prove that there is money due or payable by the respondent principal to its main contractor CTMCC. As the appellant had failed to discharge that burden of proof it is not entitled to invoke the remedy of direct payment under s. 30 of the CIPAA.

Whether There Is Evidence Of Money Due Or Payable Merely Because The Principal Has Sought An Indemnity From The Main Contractor

[82] All that the principal stated in its letter to its main contractor dated 15 September 2021 and 8 October 2021 in exh. ZL9 is that it would seek an indemnity from its main contractor should the subcontractor commence an action for direct payment.

[83] The context of the letter was to cater to a situation should the principal be found liable to make the direct payment to the subcontractor in spite of its stand that there is no money due or payable to the main contractor as can be seen below with respect to the letter of 15 September 2021 as follows:

> 1. ...
> 2. ...
> 3. Given that we do not owe you any sum for the Project, kindly take all the necessary steps to resolve the dispute between you and JDI including to settle the Demanded Sum with JDI if it is rightfully due to JDI. **In the event that JDI takes any action against us to recover the Demanded Sum, we will seek an indemnity from you.**
>
> (emphasis added)

[84] Likewise, the principal's letter of 8 October 2021 to its main contractor as follows:

> 1. ...
> 2. ...
> 3. ...
> 4. ...
> 5. As mentioned in our Letter, **in the event that JDI takes any action against us to recover the Demanded Sum, we will seek an indemnity from you.** (emphasis added)

[85] Whilst the principal is confident of the stand it had taken, there is always the element of uncertainty when a matter goes to court and so on an abundance of caution, the principal put the main contractor on notice that it would be seeking an indemnity from its main contractor should it be required to make direct payment to the subcontractor.

[86] It is not an admission that there is money due and payable to its main contractor for otherwise it would not be stating that "… we do not owe you any sum for the project, …" in its letter to the main contractor dated 15 September 2021. It is a case where in the unlikely event that it is held liable then it would be looking to the main contractor for an indemnity.

Whether There Is Evidence Of Money Due And Payable Based On A Letter Of Demand Sent Out By The Project Manager Of The Main Contractor When It Is In Liquidation

[87] Learned counsel for the appellant argued that as another panel of the Court of Appeal had earlier on 13 March 2023 allowed further evidence to be adduced in this substantive appeal hearing in the main contractor's letter of demand dated 31 January 2022 must have satisfied the test that if the new evidence be true, it would have had or would have been likely to have had a determining influence upon the decision of the High Court as is one of the requirements that the appellant must have met in accordance with r. 7(3A)(b) of the Rules of the Court of Appeal 1994.

[88] The fact that the new evidence in the letter of demand had been admitted only means that the Court of Appeal in hearing the substantive appeal would consider if the contents of the letter have been proved to be true and how that would have influenced the decision of the High Court appealed against.

[89] With respect to the weight to be attached to such a document where it had not been introduced by its maker *ie*, the main contractor, the court would have to look at the context in which the document was sent. Prior to the said letter of demand dated 31 January 2022, the principal had sent two letters to its main contractor dated 15 September 2021 and 8 October 2021 in exh. ZL9 as referred to above. The principal had stated its stand that there is no money due or payable to the main contractor.

[90] The appellant subcontractor had filed its s. 30 of the CIPAA application on 8 October 2021 and the application was heard on 23 December 2021 and the High Court dismissed the application on 7 June 2022. The main contractor CTMCC was wound up on 3 January 2022 and as such the project director who issued the letter of demand had no authority to issue the said letter. It would be for the liquidator of the wound-up company CTMCC to issue such a letter of demand.

[91] Moreover, one must distinguish between a letter of demand exhibited as proof of the fact that it existed and was sent containing the demand for RM41,844,030.18 (certified amount by architect: RM16,098,502.19 + retention amount by architect: RM25,745,527.99) as opposed to the truths of the allegations contained therein.

[92] Be that as it may the letter of demand, issued some more than three months after the principal had written to the main contractor stating why it does not owe the main contractor, would at best show that there is a genuine dispute between the parties revolving around issues not uncommon in a case of a termination of the main contract with both sides asserting that their respective termination had been lawful with the other side's termination being unlawful.

[93] The heads of claims and the quantum of the respective claims of the principal and main contractor may only be determined properly in a suit or arbitration between both the parties where witnesses and experts may be called. In the face of disputed assertions where there is no clear evidence of the money due or payable by the principal to the main contractor, the appellant's application under s. 30 of the CIPAA against the principal would have to be and was rightly dismissed by the High Court.

[94] Whilst it is true that the letter of demand dated 31 January 2022 had referred to its earlier letter of 17 September 2021 presumably in response to the letter of the principal dated 8 September 2021, we are unable to conclude in the context and circumstances of this case, as the appellant would want us to conclude, that at the time of the receipt by the principal of the subcontractor's written request for direct payment, there is a sum due or payable by the principal to its main contractor CTMCC.

[95] Granted the subcontractor may be flabbergasted and frustrated in the main contractor's tardiness in suing its principal for not an insubstantial sum of RM41,844,030.18 but then again, the main contractor would have to weigh and consider the prospects of success and the viable defences that may be advanced by the principal, not to mention an equally if not more substantial counterclaim. As it is the main contractor CTMCC is in liquidation and it would very much depend on the liquidator and the contributories and creditors to make the next move, seeing that CTMCC was wound up for its inability to pay its debts when they fell due.

[96] There is nothing stopping the appellant subcontractor, probably with other creditors, from funding the liquidator to take the necessary action to recover the huge amount to the tune of RM41,844,030.18 for after all winding up is a class action by all the creditors that could prove their debts. Until that is done, and it may well be done with success, this court is unable to say at the moment that there is money due or payable by the principal to its main contractor.

[97] We are of the considered opinion that the remedy of direct payment does not dispense with the need for proof by the subcontractor of money due or payable by the principal to the main contractor, especially in a case like this where the main contract had been terminated and the parties to the dispute over the main contract, have *prima facie* a *bona fide* dispute that can only be resolved in a litigation or arbitration.

[98] Without oversimplifying the circumstances under which a s. 30 of the CIPAA would be most effective, we would say in the case of a continuing performance of the works where there has not been any termination of the main contract, and where the performance of the works under the main contract and with that under the various subcontracts are ongoing with interim payment claims being issued from the subcontractor to the main contractor and correspondingly from the main contractor to the principal, a direct payment remedy under s. 30 of the CIPAA would be most suitable.

[99] Likewise, the remedy under s. 29 of the CIPAA for the suspension or reduction of rate of progress of performance of any construction works for instance once the relevant notice has been given by a subcontractor with an adjudication decision in its favour against its main contractor against whom an adjudication decision has been made.

[100] The court must also have regard to the fact that an adjudication decision is of interim finality only and in a case of money paid under a direct payment remedy by the principal to the subcontractor where the main contractor is already in liquidation, any recovery of the money paid in the event of a final determination in favour of the principal either *via* litigation or arbitration between the principal and main contractor would be practically impossible.

[101] We do not read in the scheme of direct payment under s. 30 of the CIPAA as that for so long as a party is the principal to its main contractor, then whatever sum the principal is called upon to make a direct payment to the subcontractor arising from an adjudication decision, then *ipso facto* the principal would have to pay without question as the amount claimed has not been paid by the main contractor to its subcontractor here.

[102] The law on privity of contract has not been displaced by s. 30 of the CIPAA and the subcontractor and main contractor take upon themselves the risk of entering into the contractual relationship and must take each other as they found each other. The CIPAA does not transfer the risk to the principal, and neither was it designed to improve the position of the subcontractor to the detriment of the principal. All that CIPAA does in line with its prophylactic properties is to help parties pursue payments due without causing prejudice to anyone affected by the process.

[103] To make the principal pay merely upon its main contractor failing to make the payment lawfully demanded by its subcontractor would be to make the principal a guarantor of all payments due from its main contractor to the subcontractor. Whilst s. 30 of the CIPAA may be a separate statutory and independent obligation to pay, that obligation does not arise until it has been shown that there is money due and payable by the principal to the main contractor and if it is so proved, then only so much of it as may be so proved would be the amount for the principal to make direct payment to the subcontractor.

[104] Thus, in *CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2018] CLJU 380; [2018] 1 LNS 380 the High Court held that:

> [80] With the greatest of respect, I therefore cannot agree with learned counsel for the Plaintiff when he said that upon a Section 30 of the CIPAA's obligation arising, it is an independent obligation to pay the subcontractor, which is independent of whether the main contractor is liquidated. He said that this approach would be consonant with the intent of making Section 30 mandatory but **I would say that Section 30 is only mandatory if Section 30(5) precondition has been fulfilled for otherwise Section 30 cannot be invoked.** (emphasis added)

[105] That sum so paid under a direct payment remedy or order may be recovered by the principal from its main contractor as a debt under s. 30(4) for it is a payment made on behalf of the main contractor. As a debt, that amount may be set off from any money due or payable by the principal to its main contractor, which is the party against whom the adjudication decision was made.

[106] The recovering of the "debt" by the principal from its main contractor is no justification for saying that even if there is no money due or payable by the principal to its main contractor, the principal would still have to pay as the work done by the subcontractor is for the ultimate benefit of the principal. As stated, the CIPAA would be making the principal a guarantor of all payments which its main contractor fails to make to the subcontractor.

[107] The present scenario of the main contract having being terminated, the obligations of the principal and the main contractor are to be resolved based on the agreed procedure that both have consented to at the time the main contract was entered into. The industry-based standard form PAM Contract 2006 (with quantities) prescribed as follows:

> 25.4(d) the Contractor shall allow or pay to the Employer all cost incurred to complete the Works including all loss and/or expense suffered by the Employer. Until after the completion of the Works under Clause 25.4(a), the Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined. Upon completion of the Works, an account taking into

consideration the value of works carried out by the Contractor and all cost incurred by the Employer to complete the Works including loss and/or expense suffered by the Employer shall be incorporated in a final account prepared in accordance with Clause 25.6.

[108] There is the obligation on the part of the architect or quantity surveyor of the project to prepare the necessary account after a joint inspection between the employer and its main contractor as captured in the following cls. 25.5 and 25.6:

25.5 The Architect or Quantity Surveyor shall within twenty eight (28) Days of the determination of the Contractor's employment, give a written notice to the Contractor of the date of inspection on Site to jointly record the extent of the Works executed and the materials and goods delivered to the Site. The Contractor shall provide all necessary assistance to the Architect and Quantity Surveyor to perform their task. Upon completion of the record by the Architect or Quantity Surveyor, a copy shall be sent to the Contractor and such records shall form the basis for the evaluation of the value of the works executed and materials and goods delivered to the Site by the Contractor up to the date of determination.

25.6 The Architect or Quantity Surveyor shall within six (6) Months on completion of the Works, submit to the Employer and Contractor for their agreement, a final account for all cost incurred to complete the Works including the sums previously certified to the Contractor before the date of determination, Liquidated Damages, set-off and all other loss and/or expense suffered.

[109] We have as alluded to above the QS report dated 12 January 2021. Under cl. 25.6(c), it is provided that "any dispute on liquidated damages, set-off and interest which the employer is entitled to make under the contract shall be referred to arbitration." As there is no evidence of no dispute between the employer/principal and the main contract, the matter would finally have to be resolved in arbitration.

[110] By no means are we deciding here as to whose termination is lawful; that of the employer/principal or that of CTMCC main contractor for that can only be properly addressed and decided finally in the arbitration between the two parties.

[111] Likewise, if the prior termination by the main contractor is lawful then the following procedure as agreed between the parties would apply:

26.4 In the event that the employment of the Contractor is determined under Clause 26.1 or 26.3, the following shall be the respective rights and duties of the Contractor and Employer:

26.4(a) the Contractor shall within fourteen (14) Days or within such longer period as may be agreed in writing by the Architect, remove from the Site all his temporary buildings, construction plant, tools, materials and goods and shall give facilities for his Nominated Sub-Contractors to do the same; and

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> 26.4(b) the Employer shall allow or pay to the Contractor the total value of work properly executed and the value of materials and goods supplied including any loss and/or expense suffered by the Contractor caused by such determination.
>
> 26.5 The Contractor shall within twenty eight (28) Days of the determination of his own employment, give a written notice to the Architect and Quantity Surveyor of the date of inspection on Site to jointly record the extent of the Works executed and the materials and goods delivered to the Site. Upon completion of the record by the Contractor, a copy shall be sent to the Employer, Architect and Quantity Surveyor and such records shall form the basis for the evaluation of the value of the works executed and materials and goods delivered to the Site by the Contractor up to the date of determination.
>
> 26.6 The Contractor shall within six (6) Months after determination of his own employment, submit to the Employer, Architect and Quantity Surveyor for the Employer's agreement, a final account for the total value of work properly executed, the value of materials and goods supplied and loss and/or expense suffered by the Contractor caused by such determination.

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[112] As both the principal and main contractor could not agree on the issue of whose termination is lawful, the matter would have to be resolved at arbitration. The consequences and calculations with respect to the heads of damages would be different depending on which termination is lawful.

E

[113] As between the principal and the main contractor, there was no adjudication under the CIPAA between them, the issue of whether cl. 25.4(d) above is a conditional payment term prohibited under s. 35 of the CIPAA does not apply. The parties may want to reserve for argument at the arbitration or litigation between them if cl. 25.4(d) applies or does not apply in a non-adjudication proceeding under the CIPAA.

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[114] We are aware that some High Court cases had decided that cl. 25.4(d) is in the nature of a conditional payment provision prohibited under s. 35(1) of the CIPAA which prohibition reads as follows:

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> Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

[115] Such a clause has the effect, upon the termination of the contract, of postponing payment due until the final accounts are concluded and the works completed and was held in the following cases as defeating the purpose of the CIPAA and is thus, void and unenforceable:

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(i) *Econpile (M) Sdn Bhd v. IRDK Ventures Sdn Bhd & Another Cas*e [2016] 5 CLJ 882 (at para. [83]);

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(ii) *BM City Realty & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case* [2016] CLJU 1096; [2016] 1 LNS 1096 (at paras. [31] and [32]); and

(iii) *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] CLJU 177; [2017] 1 LNS 177 (at paras. [125] to [145]).

[116] There are other High Court cases that endorsed and adopted the same approach to other types of conditional payments. See the cases of *Ireka Engineering & Construction Sdn Bhd v. TRI Pacific Engineering Sdn Bhd* [2020] CLJU 387; [2020] 1 LNS 387; [2020] MLJU 548, (per Wong Kian Kheong J (now JCA) at [19] to [21]) and also *Lion Pacific Sdn Bhd v. Pestech Technology Sdn Bhd & Another Case* [2020] CLJU 2170; [2020] 1 LNS 2170; [2020] MLJU 2308 (per Wong Kian Kheong J (now JCA) at [20]).

[117] We agree with the above High Court decisions on why cl. 24.5(d) of the PAM Contract 2006 should be considered a conditional payment provision that is prohibited in an adjudication claim. The issue of whether such a conditional payment provision is applicable in an arbitration or litigation claim between the contracting parties and not in an adjudication is a separate issue altogether.

[118] Whilst such a clause like cl. 25.4(d) of the PAM contract has been held to be a conditional payment provision which is prohibited under s. 35(1) CIPAA in an adjudication between the parties to the construction contract, it may still be upheld by the courts in an arbitration or litigation between the parties in this case between the principal and the main contractor. The prohibition appears to be confined to adjudication proceedings as the long title suggested as follows:

> An Act to facilitate regular and timely payment, **to provide a mechanism for speedy dispute resolution through adjudication,** to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. (emphasis added)

[119] At any rate, it would be definitively decided at that stage whether such a clause is prohibited or permitted in a non-adjudication proceeding. For the moment, we are not unaware that there are at least two different positions taken at the High Court level. In *Bond M & E (KL) Sdn Bhd v. Isyoda (M) Sdn Bhd; Brampton Holdings Sdn Bhd (Third Party)* [2017] CLJU 259; [2017] 1 LNS 259; [2017] MLJU 376, it was held as follows:

> [65] However, it is clear from section 35(2) CIPAA that such a clause is void only for the purposes of the said section; in other words it is only void for the purpose of Adjudication. If Parliament had wanted the prohibition to be of general application in the construction industry, it would have amended the Contracts Act 1950 and not confine and restrict its operation to statutory Adjudication under CIPAA.

[120] A contrary view was expressed in the High Court decision of Wong Kian Kheong J (now JCA) in *Khairi Consult Sdn Bhd v. GJ Runding Sdn Bhd* [2021] CLJU 571; [2021] 1 LNS 571; [2021] MLJU 694, at [20] to [22] and

[24], in *Gandahan Sdn Bhd v. Gigatech Engineering Sdn Bhd* [2021] CLJU 2357; [2021] 1 LNS 2357; [2021] MLJU 2684 at paras. [6(1)], [28] and [29] and in *Multi Network Sdn Bhd & Anor v. Pembinaan Jari Jaya Sdn Bhd* [2022] CLJU 3223; [2022] 1 LNS 3223; [2022] MLJU 3452 at paras. [31] to [35]. The reasons given are *inter alia* that the contract in question comes within the definition of "construction contract" under s. 2 of the CIPAA and that s. 35 has a general application to "construction contract" and that conversely Parliament had not confined the applicability of s. 35 to adjudication alone under the CIPAA.

[121] For the moment, we do not see why the court should not uphold freedom of contract and the terms freely agreed to by the parties with respect to the procedure to follow and subsequent payment upon settling and finalising of the account between the parties. Even if cl. 25.4(d) is a conditional payment term applicable in an arbitration or litigation and thus prohibited, the arbitral tribunal or the court, as the case may be, would be best positioned to decide and determine the amount payable as these issues would be the subject matter of the claim before arbitrator tribunal or the court.

Whether The Fear Of A Double Recovery Should Be A Factor To Be Considered For Dismissing A Section 30 Of The CIPAA Direct Payment Application

[122] The High Court appeared to have taken the factor of a fear of double recovery as a further ground for dismissing the s. 30 of the CIPAA direct payment application. The High Court had held as follows in its grounds of judgment:

> [16] Further, it is pertinent to note that, the Plaintiff had filed an action in the Johor Bahru High Court to enforce the adjudication decision against CTMCC in which CTMCC had not entered appearance. *Allowing the Plaintiff's application for direct payment in the present case would lead to double recovery should the court allow the Plaintiff's action against CTMCC in the other court proceedings. This results the Plaintiff will have two enforceable judgments against two separate parties for the same sum and most likely be unjustly enriched.* (emphasis added)

[123] That fear is unfounded. The concern of double payment is more than addressed by the principal having required to serve a notice on the main contractor to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice in a case where there is money due otherwise payable from the principal to the main contractor.

[124] The main contractor would naturally respond with proof of payment if indeed it has made payment to the subcontractor here. It is only if there is no proof of payment or no response whatsoever that the principal is

obliged to make the payment over to the subcontractor or so much of the sum owing by the principal to the main contractor not exceeding the sum claimed by the subcontractor. There is thus no valid reason for the fear of double payment or recovery and much less of the subcontractor unjustly enriching itself. See para of *HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors* [2018] CLJU 1938; [2018] 1 LNS 1938 at para. 85.

[125] The remedy under s. 30 of the CIPAA is one of the three remedies provided "for the recovery of payment in the construction industry" under Part IV enforcement of adjudication decision as follows:

s 28. Enforcement of adjudication decision as judgment

s 29. Suspension or Reduction of Rate of Progress of Performance

s 30. Direct Payment from Principal

s 31. Concurrent Exercise of Remedies

[126] Nowhere is it stated that the remedy under s. 28 cannot be applied for and obtained once a successful claimant in the adjudication like the subcontractor here has obtained an order under s. 30 of the CIPAA for a direct payment from the principal. If that were the requirement s. 31 on "concurrent exercise of remedies" would be otiose and only of ornamental value. The Legislature must be presumed not to waste words or to expend them for pure decorative purpose.

[127] The word "concurrently" used in s. 30(1) of the CIPAA cannot be clearer. Section 31 reads as:

31. Concurrent Exercise of Remedies

(1) Unless a stay is granted under section 16, a party who obtained an adjudication decision in his favour **may exercise any or all of the remedies provided in this Act concurrently to enforce the adjudication decision.**

(2) The remedies provided by this Act are **without prejudice to other rights and remedies available in the construction contract or any written law,** including any penalty provided under any written law.

(emphasis added)

[128] The word "concurrently" cannot be read as "sequentially" or "consecutively" after exercising its remedy under s. 30 of the CIPAA. That is not borne out by the words used which can only be interpreted one way which is that the successful claimant may exercise any or all of the remedies concurrently and each of the remedy under ss. 28, 29 and 30 may be exercised singly or in combination in the enforcement of the adjudication decision. See *CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2018] CLJU 380; [2018] 1 LNS 380; [2018] MLJU 471 and see *HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors* [2018] CLJU 1938; [2018] 1 LNS 1938 HC at para. 77.

[129] The only remedy against the principal by a party in the position of the subcontractor as the successful claimant in the adjudication would be a s. 30 of the CIPAA remedy of direct payment or if the adjudication decision has been enforced as if it is a judgment of the court, then probably a garnishee order to show cause as the remedies under ss. 28, 29 and 30 are "without prejudice to other rights and remedies available in the construction contract or any written law". See s. 31(2).

[130] The judgment creditor would be required to serve the garnishee order to show cause on the principal as garnishee and on the main contractor as judgment debtor under O. 49 r. 3(1)(a) and (b) Rules of Court 2012 respectively. Surely upon being so served, if the main contractor/judgment debtor had made payment to the subcontractor/judgment creditor, it would certainly alert the court's attention to the subcontractor's attempt to abuse the court's process and possibly even contemptuous in misleading the court.

[131] Likewise, if the principal/garnishee had earlier made a direct payment under s. 30 of the CIPAA, it would also reveal the bad faith and contemptuous conduct of the subcontractor is trying to pull a fast one and to recover double or more than what it was entitled.

[132] The three remedies under ss. 28 to 30 may be applied either concurrently or in combination with each other or singly as part of the arsenal available to the successful claimant to activate and deploy in its efforts to recover the payments due under an adjudication decision.

[133] Whilst we would agree with the decision of the High Court in dismissing the application under s. 30 of the CIPAA for direct payment, we would nevertheless state categorically that the further reason given by the High Court to dismiss the application for fear of double recovery is not a valid ground and ought to be disregarded.

Decision

[134] For all the above reasons given, we are unable to see how the High Court had erred in its decision to dismiss the s. 30 of the CIPAA application of the appellant. We found no merits in the appeal as overall, the appellant had not discharged its legal burden on the balance of probabilities to prove that there is money due or payable by the respondent to its main contractor CTMCC which money if conclusively determined, could be the subject matter of a direct payment order to the appellant as the subcontractor.

[135] The appeal was thus dismissed with costs of RM10,000 to the respondent subject to allocator.

[136] As the fear of double recovery does not arise, the appellant is free to explore other modes of recovering the amount outstanding to it from the main contractor, now that it had wound up its main contractor CTMCC. It is for the liquidator appointed, an officer of the court, to explore how the amount outstanding to the appellant by the main contractor could be efficiently and effectively recovered.